No. 8130

In the United States
Circuit Court of Appeals
For the Ninth Circuit

INLAND POWER AND LIGHT COMPANY,
a corporation, Appellant,

vs.

FAY M. GRIEGER and MARY LOIS GRIEGER,
Appellees.

Appellees' Brief

Upon Appeal from the District Court of the United States for the Western District of Washington, Southern Division.

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TABLE OF CONTENTS

TABLE OF CASES AND STATUTES CITED

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EXPLANATORY NOTE

It appears that there is some ambiguity in the record with regard to the numbering of Exhibits No. 9 and 13. One is a chart for Gurley Graphic

Recorder, the other is a tabulated record of mean daily lake elevations. Neither counsel for appellant nor counsel for appellees had numbered copies of these exhibits before them at the time of writing their briefs, and we believe that there may be some misconception of the proper numbering of these two exhibits.

It appears that where appellants have referred to the chart for the Gurley Graphic Recorder they have referred to it as Exhibit No. 13. We believe that this may be an error. However, in order to avoid confusion we have also referred to the same exhibit by that number. Therefore, in writing our brief, wherever we refer to Exhibit No. 13, we have reference to that exhibit which is titled "Chart for Gurley Graphic Recorder" and has a continuous pencilled line showing the lake elevations from December 16 to December 22, inclusive, and bears the name of H. W. Schmidt at the lower right hand corner. We have discussed this matter with counsel for appellant and are advised that where in their brief they refer to Exhibit No. 13 they have in mind the "Chart for Gurley Graphic Recorder" and where they refer to Exhibit No. 9 they have in mind that exhibit which is a tabulated record of the mean daily elevation of Lake Merwin.

A COPY OF THE EXHIBIT TO WHICH WE HAVE REFERRED IN OUR BRIEF AS EXHIBIT NO. 13 IS APPENDED HERETO.

STATEMENT OF THE CASE

This action was tried by jury and it is our understanding that in this Court, appellees are entitled to the testimony most favorable to his cause appearing in the record, and that the case is not to be tried here upon appellant's evaluation of the testimony most favorable to itself.

We shall attempt to point out, not only in its narrative statement, but in its discussion of the case throughout, appellant has selected the bits of testimony most favorable to itself, and has entirely ignored the testimony which sustains the verdict.

This action was brought by appellees to recover damages sustained to their land and personal property caused by the release of impounded flood waters, released by appellant through the flood gates of appellant's dam on or about the 22nd day of December, 1933.

At the time this controversy arose, appellant owned and operated a hydro-electric plant on the Lewis River, located at Ariel, about 12 miles north and east of Woodland, Washington. The dam erected on this power site backs up the water in the Lewis River and creates a reservoir, known as Lake Merwin, which covers an area of about 4,000 acres and raises the elevation of the surface of Lake Merwin to upward of 235 feet. The dam structure is provided with 5 flood gates, disposed in the upper portion of said dam which provide means for

controlling the elevation of the water in the reservoir. The arrangement of the power plant and dam is such that the waters do not flow over the top of the dam, but all food waters except a small portion used for generation of power, must be released or spilled through these flood gates.

At the time this controversy arose, the plaintiffs owned and operated a dairy farm located on the bank of the Lewis River about 4 miles downstream from appellants' dam.

Inasmuch as appellants' motion for non-suit, motion for directed verdict, and petition for a new trial were based upon their challenge to the sufficiency of the evidence to support the verdict, it is necessary for appellees to review, in narrative form, the evidence upon which the verdict was based.

Exhibit No. 10 is a record compiled by the U. S. Geological Survey and shows the mean or average daily flow of the Lewis River at Ariel, Washington.

Plaintiff's Exhibit No. 13 is a graphic history of the elevation of the reservoir, often referred to in the record as Lake Merwin.

This is a record made under the supervision of the United States Geological Survey and is submitted to the office of the U. S. Geological Survey under requirements of the Federal Power Commission (Transcript of Record, 106).

It is a photostatic copy of the original record

made by an automatic stage recorder located immediately behind and on the upstream side of the dam. An examination of the exhibit provides an accurate history of the storage and release of waters behind the dam. The record shows, that the impounded waters cover an area of about 4,000 acres (Tr., 145). It is readily evident that a sudden reduction in the elevation of the lake would release a tremendous volume of water in addition to the natural flow of the stream.

Exhibit No. 13 further discloses that shortly after midnight on December 22, 1933, the elevation of the lake was sharply lowered, followed by a continued lowering for a period of 24 hours.

It will be observed that shortly after midnight December 22, 1933, waters were abruptly released. The volume of water so released in addition to the natural flow of the stream, is easily susceptible to calculation. This exhibit shows that during the period of 30 minutes immediately succeeding midnight the elevation of the lake was lowered 6 inches in about 30 minutes. The area of the lake being 4,000 acres, this would mean a discharge of 2,000 acre feet, or 87,120,000 cubic feet of water in addition to the natural flow of the stream, all in the space of 30 minutes. Thirty minutes equal 1,800 seconds; 87,120,000 divided by 1,800 equals 48,400 cubic feet per second, which represents the acceleration of the stream over and above its natural flow for that period.

Taking Exhibit No. 13 and Exhibit No. 10 together, on examination, it appears that shortly after midnight December 22, 1933, a tremendous volume of water was released, the elevation of the lake was lowered six inches in 30 minutes, accelerating the flow by 48,400 cubic feet per second over and above the natural flow, and reaching the peak discharge of 129,000 cubic feet per second (Exhibit No. 10). Obviously, where the surplus over the natural flow was 48,400 second feet, and the total was 129,000 second feet, the natural flow must have been 129,000 minus 48,400 or 80,600. Hence there was an acceleration of approximately 60 per cent for the peak discharge period—enough surplus water to cover more than 30 acres 66 feet deep in 30 minutes —a surplus flow sufficient to cover 1000 acres 2 feet deep in 30 minutes!

Examining Exhibit No. 13 further, it may be observed that the lake elevation was lowered 2.1 feet in a space of 9 hours and 44 minutes from 12:16 A.M. to 10:00 A.M., December 22nd, which means that during such period 8,400 acre feet or 365,904,000 cubic feet of water were released in excess of the natural flow of the stream. Nine hours and forty-four minutes equals 35,040 seconds; 365,904,000 divided by 35,040 equals 10,440 cubic feet per second, which represents the average acceleration of the stream during this period. The average acceleration however, embraces a maximum and a minimum. The maximum occurring when all gates

stood wide open at lake elevation 237.6 and the flow continuing to decrease as the elevation of the lake continued to drop. It is therefore obvious that the acceleration on the natural flow and the effect of a sudden release of storage waters cannot properly be computed upon the AVERAGE acceleration over a long period of time.

Pursuant to further observation of Exhibit No. 13, it appears that from about 12:16 A.M. of December 22nd, to midnight the beginning of December 23, 1933, the elevation of Lake Merwin was lowered about 4 feet, which represents a volume of 16,000 acre feet of water released in excess of the natural flow, or a mean acceleration of about 8,000 cubic feet per second for that period.

The figure 129,000 on Exhibit No. 10, at the top right hand corner of the chart, represents the peak discharge of cubic feet per second occurring shortly after midnight, December 21 to December 22 (Calkins Testimony, Tr. 96-97). (The letters E. S. T., indicate that from December 18, 1933 to January 4, 1934, the flowage was estimated, due to the fact the gauging station below the dam had been destroyed).

In view of Exhibits No. 10 and 13, the jury could reach but one conclusion—that enormous quantities of water IN ADDITION to the natural flow of the stream were discharged. Whether or not the flood gates were operated according to the com-

pany's log (Exhibit No. A-2) was a question of fact for the jury to determine.

All of the testimony was to the effect that during all of the month of December, 1933, the Lewis River Basin was visited by heavy rainfall and periods of warm weather. And instead of allowing the flood waters to run off as they were wont to do by nature, the waters were additionally impounded, only to be abruptly released on December 22nd.

FRANK MILES TESTIFIED: (Tr., 112) "In December, 1933, it was very rainy. The rain didn't affect the flow of the Lewis River down at my place, but it was filling the dam. Not much of anything was happening to the Lewis River, that is down where I live, three miles below the dam, because they run the wheel up there, and they use just what comes in, and then what is over they use for storage. Sure I seen what was taking place in the dam during the rainy period; the lake was raising of course. During the period up to December 22, 1933, prior to the 22nd,—yet, I believe the small one, they call No. 1, that was pretty well open pretty much of the time. That is if I remember right, and I think there was another time—in fact I went up there maybe every three or four days or maybe every other day, because I had a stand in with the superintendent of the fish hatchery there, and he had a car and he went

up to look at the traps, and always said, "Come on, Dad, and take a ride," and I get in and that is how I seen the gates about every day, and that is how I seen the reservoir (Tr. 115). "I was at the dam on December 20th; the gates were about the same as the day before. The No. 1 was up about 10 feet or maybe more, and No. 2, as they call it, I would call it No. 2, was out about six or eight feet, but the others was tight. Yep. I was there again on the 21st; that was the day she was just about overflowing. By looking across the channel you would find that it was up against the coping, that would be six inches, but of course it could not have been because the glistening of the water would make some difference. Mr. Shore was not there that day. There was a man there they call a roustabout. I don't know what his name is. The gates on the 21st were about the same condition as they was the last time I seen them. On the 21st the gates were just the same as the day before. They might have been up a little."

MR. CARL E. INSULL TESTIFIED: (Tr., 58) "Tuesday was the 19th of December; I recall the condition of the weather that day. I live mostly on the Lewis River banks, and I watered my cattle in the river. On Sunday, December 17th, I watered my cattle in the forenoon, but in the afternoon and after that on Monday I can't water it in the river; the river

was very low at the time. . . . . The current was highest on the morning of the 22nd, between 12 and 1 o'clock; that is for one hour. That is when the flood reached its peak, and that is when the current was the swiftest. After that it was stationary just a few hours; that the flood started slowly to come down." (Tr., 67).

MR. GRADY PHILLIPS TESTIFIED: (Tr., 69) "Mr. Grieger's property adjoins my property on the west. I saw the river running along their place at that time. I saw it practically every day for 8 or 10 days, until the 21st. Up to the 20th there was not any cutting of banks of the Lewis River along the Grieger's property that was noticeable to me (Tr., 70). I did not notice any noticeable change until the morning of the 22nd, was the first change I noticed. It rained all night the 21st. ON THE MORNING OF THE 22ND IT WAS MORE LIKE AN OCEAN THAN A RIVER THEN."

David Shore, superintendent of the appellant company at Ariel dam gives ample confirmation of the above testimony despite his evident reluctance to testify in plaintiff's behalf (Tr., 141): "As to how we closed the gates on the 22nd, on Friday, starting at 2 o'clock, this chart shows Nos. 1, 2, 3 and 4 up 25 feet; No. 5 up 15 feet; that was midnight, WE DID NOT START TO CLOSE THEM UNTIL THE

NEXT DAY AT TWO; THAT IS FRIDAY AFTERNOON."

This statement by Shore, coupled with the great drop in the elevation of the lake shown to have taken place in Exhibit No. 13 between midnight and 2 P. M., Friday, December 22nd, amply sustains the plaintiff's contention that the appellant's negligence was responsible for the damage to his property. The testimony continues—

FAY GRIEGER, PLAINTIFF, TESTIFIED (Tr., 156): "In the early part of December, 1933, I was home on the place, I was down near the river off and on (Tr., 157) all of the time during the month of December. As to what would take me down there,—well, we got our cows, and I went along the river bank practically every day, going to town and back. I observed the condition of the weather in regard to moisture. It was raining quite a lot during that time; sometimes it would rain quite heavy. The temperature was very warm for that time of the year; it was warm enough to melt the snow on the high places; there was no snow that could be seen on the high hills there. I observed the condition of the height of the river along about the 10th of the month. The river at that time was fairly high, and some water had backed in over my place at one time. It did not stay there but a little while at that time, and it went over the road on one place down about three and a

half miles down the road. As to whether its height increased from day to day along up until the 20th of the month,—well, that was the only high water we had between those dates. It kept on raining between the 10th and 20th; it rained quite a lot then and was warm, and there was hardly any water coming down the river at all then. I noticed the condition of the river on the 19th. On the 18th the water was down. It had not come up very much then. On the 19th the water had raised quite a little, and it went over the road in a couple of places; and then it dropped back down some. It went over the county road one place about a half a mile from Woodland, and the other place was (Tr., 158) around a mile and a half below me towards Woodland on the Clark County side. On the 19th it was up. On the 20th it was about the same height, and on the 21st it came up quite a lot on that day. I observed it first in the morning; it was up further than it had been any time during that week.

Up until the 21st the current had been running out in the channel more. There was some water over part of the ground at that time, but the current was way out in the channel of the river. Prior to the 20th it was not cutting away any of my land. I did not at any time observe the current cutting away any of my land up to the 21st; I noticed it on the 22nd. We stood

on the hill above the water, and we could see it taking the trees which was down on the northeast corner. It would take out trees right along there. Then farther up we could see some of the soil going there. It was warm there. I saw the waters subside on Friday; on Friday afternoon (December 22nd) it dropped some, from practically 2 or 3 o'clock it dropped quite a little. I saw it wash practically two channels through the land at that time; you couldn't see clearly then yet."

Reviewing the evidence, it is clearly evident that during the month of December, 1933, and particularly from the 5th to the 22nd of December, 1933, the Lewis River basin was visited with heavy rains, and periods of warm weather, sufficiently warm to melt snow on the hills; that in spite of the turbulent history of the Lewis River, and in spite of the fact that conditions indicated impending flood conditions, the company kept backing up the Lewis River behind its dam, increased its storage and raised the elevation of its reservoir to more than 237 feet. In spite of heavy rains and tremendous volumes of water flowing into the river from its tributaries, the river below the dam was kept at a low stage for several days prior to the tragic and abrupt release of waters at 12:16 A.M., December 22nd, 1933. It appears that at about midnight, the beginning of December 22nd, the flood stage reached its peak. The power company's superin-

tendent then called his seven men together and they decided to open everything and abandon the plant (Tr., 132). This was promptly done, resulting in the releasing of a tremendous volume of storage water in addition to the natural flow of stream, while it was running at flood stage. The destruction which was wrought by these acts are evidenced by the testimony of witnesses and the exhibits previously referred to. While the river at Mr. Grieger's property was high during December 21st, the evidence shows that the cuting away of his soil was concurrent in time with the release of storage waters from Lake Merwin. Several witnesses testified to the great acceleration of the stream flow shortly after midnight December 22nd. The gauging station located below the dam had been destroyed, consequently no continuous record of the volume of flow is available, however, it was estimated by the United States Geological Survey that the flow reached a peak of 129,000 feet per second. The estimate is not challenged by either party. It is obvious that upon opening the gates with the elevation of the lake standing at 237.6, the greatest on-rush of water must have occurred at that time.

After the elevation of the lake started to drop, of course, there would be a corresponding decrease in the volume of flow. Exhibits No. 13 and 10 taken together would indicate that shortly after midnight of December 22nd, 1933, the natural flow of the stream was accelerated by more than 60 per

cent, and that the percentage of acceleration began to diminish continuously until the lake level again became constant.

Appellant's counsel have attempted to show a small percentage of mean acceleration over a long period. Perhaps they could do better by taking the average percentage for a week or a month, or better still, wait until such time that they could again build up their lake elevation to 237.5 feet. Then the average discharge would equal the average flow of the stream.

The evidence shows that upon the operation of the flood gates at midnight, December 22nd, the powerhouse was swamped with water, the machinery was put out of operation, and the flood gates all remained wide open for 14 hours, until the company could bring in a new power line and obtain an outside source of power to operate its gates (Tr., 86-87).

Mr. Shore emphatically testified that the gates may be operated manually (Tr., 86-124) but no explanation was made as to why they were not so operated, nor why the lake elevation was permitted to drop continuously until such time as a source of power was available for the closing of the gates.

> MR. SHORE FURTHER TESTIFIED: (Tr., 130) "All of the water which comes out of the Lewis River in the vicinity of Woodland has necessarily to come by the channel and the

property of Mr. Grieger, the plaintiff in this action."

The respondents, plaintiffs in the court below, were in a position where they were compelled to call as witnesses in their behalf, a number of employees of the appellant company. They were naturally reluctant to testify for plaintiff, but in spite of that fact, the record shows the cause and the effect of the tremendous discharge of impounded waters.

REGARDING THE EFFECT OF THE FLOOD UPON PLAINTIFF'S PROPERTY, MR. PHILLIPS TESTIFIED: (Tr., 70) "The morning of the 22nd, I would say, was the first I noticed the river begin to cut. The Grieger property was just washing away. It had just simply cut everything—it looked to be down about 8 to 10 or 12 feet. It washed down to gravel or bedrock. I would call the soil on that place a silty loam. I am not a land expert. The silty loam washed away. I could not say exactly how many acres of it were washed away. I should judge 50 or 60 acres probably."

MR. GRIEGER TESTIFIED: (Tr., 158) "Until Saturday we couldn't tell much about it, but as the water went down further, then we could see the extent of the wash it had made there. It subsequently dried off. Where we had our farm land, and which had been fenced in by woven wire fence, we found that we had no

soil at all. It was washed clear to the gravel in there, and up further to the (Tr., 159) south it had cut or washed out chasms at two or three different places there. It hadn't washed quite as deep there, but in different places it cut up the land quite a lot there.

These pictures handed me, which are marked plaintiff's Exhibit 1 to 7, were taken on my property. I saw them taken. I was down there when they were taken; in fact, I am in three of the pictures. The man standing along the bank in three of these pictures is myself. Prior to the flood the condition of the soil where I am standing was level soil. When the river was at normal flow I would judge it was 10 or 11 feet above the river. Now it is probably a foot, or a foot and a half, above the river. If the water comes up any at all it will use it as a channel. The soil in there was silty loam; the best soil I had. I haven't found anything that anyone would now recommend raising on it. That is the place where it is worn down clear to the gravel. Driftwood was throwed up all over the place there. In one drift pile we counted 21 trees; they were all sizes anywhere from four inches up to a foot and a half through. There were three or four big cottonwood trees washed in there. Three of them is still on the place there. One was washed up on top of two apple trees there, and was resting there after

the flood, and two of them are laying up on a big sand pile there. There is some stumps washed in there also. Sand was washed in all over the place. Some of the piles of sand is as deep as (Tr., 160) five and six feet high; anywhere from six inches up to six feet; most of it is a coarse sand. Once in a while you will find a little finer sand with so silt or anything in it. It is not capable of producing anything. It is a detriment to the soil because you can't raise anything on it. It has the soil covered up, and stuff couldn't grow through it at all.

Approximately around 45 acres of my land was washed away, and I would judge in the neighborhood of 30 or 35 acres of it was covered with sand. As to whether that that has the sand on is used for any purpose,—the cows run over it once in a while, but nothing will grow on it.

There wasn't any side of fences left. We found part of the woven wire fence, maybe two hundred feet of it, piled up in the driftwood. We couldn't ever find any of the rest of the woven wire fence at all, and we found maybe one or two of the barbed wires and the cross fences. I had just finished the woven wire fence in June before the flood; there was around 120 rods of it. They were new posts; we put new cedar posts in the whole fence. A cedar post is supposed to be the best type outside of steel

posts. We figure the cost of putting in the fence, and the material, and everything in the amount of about $450.00.

We had oats and vetch at that time, for hay, that we would have harvested the next year, and we had a small crop of clover on the place; there was in the neighborhood of 34 or 35 acres. The reasonable (Tr., 161) value of the crop would be in the neighborhood of $800 or $900 when it was harvested. There was some timber on the premises; some fir and some cedar, and here and there was cottonwood scattered through, small trees, a lot of it washed out there. The reasonable value of the timber that I lost was in the neighborhood of $200.00.

Exhibit No. 17 for identification, which you hand me, I recognize as one that was taken under my direction. That depicts the type of sand that is on the place. That sand washed in there during the night of the 21st and the day of the 22nd.

(Thereupon Exhibit No. 17 for identification, a picture showing sand on plaintiff's premises, was admitted in evidence, and marked Plaintiff's Exhibit 17.)

"Exhibit 17 was not taken on the part of my land that was washed away; that is some of the land with the sand piled on it. Right in back of that mound, right back of me, is a pile

of sand. There is a log and a stump laying right there where I am standing; that is sand.

I have prepared a sort of sketch of my place; it shows the section where it was damaged,—well it shows the whole—I made a sketch of the whole place from the county road back to the river. It shows an outline of the land, and I tried to show where the ground washed out there. I will try to show the way my place lays with reference to the river (Tr., 126). The sketch shows the turn of the river and the channel of the river before the flood. It shows the lands have been cut into. This map isn't drawn to scale; it is a sketch. The boundaries of the land is defined there. I didn't have any survey or any measurements made as to the actual quantity of land washed over; I didn't have the means and so forth to make that. I think your company has one that they have made."

REGARDING THE VALUE OF PLAINTIFF'S LAND BEFORE AND AFTER THE FLOOD MR. GRIEGER TESTIFIED: (Tr., 156) "I judged the reasonable market value of such land as mine with the buildings on it in the year 1933 was in the neighborhood of $22,000. I know the value of other lands in the neighborhood of the same kind, by the acre, regardless of buildings. Some of the land was valued around $200.00."

(Tr., 165) "I know the reasonable market

value of the place after the flood. It is just a place to live. I don't know that you would get anybody to buy it. I wouldn't judge it would be worth over $1,000.00 or $2,000.00. About the only value you would get out of it would be in the lumber of the buildings."

ON THE QUESTION OF THE VALUE OF PLAINTIFF'S LAND, MR. INSULL TESTIFIED: (Tr., 63) "I know the reasonable value of the type of land owned by Mr. and Mrs. Grieger in the month of December, 1933. I know the type of buildings that were on Mr. Grieger's place. I know the value of the entire property of the farm prior to the flood (Tr., 65). As to my opinion of the reasonable market value of the Grieger place prior to the flood of 1933 —land of that type was worth at least $250.00 to $300.00 an acre. I have seen the land since the flood. The place is almost washed away. The buildings is there on some high banks, the lands on that place were mostly low bottom land."

REFERRING TO EXHIBITS NO. 1 and 7, MR. INSULL TESTIFIED: (Tr., 66) "Those photographs correctly describe the land that has been affected by the water. I know the reasonable market value of the Grieger place after the flood. As to the reasonable market value of this place, there is no value of any kind of land today, not my place or anybody else's,

no value after the flood. I cannot give it away, my place."

POINTS, AUTHORITIES AND ARGUMENTS

Point I.

No fact tried by a jury shall be otherwise re-examined in this Court unless the Court can affirmatively say that there is no substantial evidence to support the verdict.

U.S.C.A., Title 28, Sec. 879.
Herencia v. Guzman, 219 U. S. 44.
Commercial Travellers Mutual Acc. Ass'n of America v. Fulton, 93 Fed. 621.
Humes v. United States, 170 U. S. 210.
Lehigh Valley R. Co. v. State of Russia, 21 Fed. (2d) 406. Cert. denied 48 S. Ct. 159.

ARGUMENT

We presume that we are not required to elaborate to any great length on the authorities in support of this point. The rule that questions of fact tried by a jury are not to be re-tried on appeal and that a verdict shall not be disturbed, where it is supported by any substantial evidence, that all reasonable inferences must be resolved in favor of the respondent, is a rule upon which all the authorities are in agreement.

In the case of Herencia v. Guzman, 219 U. S. 44, the Court said:

> "The argument on behalf of the plaintiff in error proceeds upon the assumption that this Court may review the evidence as to negligence and as to the damages recoverable, and may reverse the judgment if the Court is dissatisfied with the findings of the jury. This, however, is not the province of the Court upon writ of error. As there was evidence proper for the consideration of the jury, the objection that the verdict was against the weight of evidence or that the damages allowed were excessive cannot be considered."

In the case of Lehigh Valley R. Co. v. State of Russia, 21 Fed. (2d) 406, the Court held:

> "There was evidence of negligence on the part of the railroad company which required the trial judge to submit questions to the jury for their determination. We cannot weigh the sufficiency of that evidence."

In the case of Commercial Travelers Mutual Acc. Ass'n of America v. Fulton, 93 Fed. 621; the plaintiff sought to recover on an accident policy. The evidence showed that the insured suddenly fell, striking a water spout, which left external marks on his head and that he died a few minutes thereafter. It appeared that deceased was troubled with disease of the heart. The primary question in the case was whether the fall produced the effect on the brain that he died in consequence of the blow so received, or whether the fall caused his death only by producing such an acute aggravation of the disease of his heart that he died, when a man with a reasonably healthy heart would have lived.

In commenting upon the evidence, the Court said:

> "That we may be inclined to a conclusion thereon differing from that expressed by the jury in their verdict, is no ground for disturbing their verdict if there can be found anywhere in the record, evidence sufficient to warrant the Court sending the case to the jury."

In the case of Humes v. United States, 170 U. S. 210, the Court said:

> "The alleged fact that the verdict was against the weight of evidence, we are precluded from considering, if there was any evidence proper to go to the jury in support of the verdict."

We submit that in the case at bar, the question of defendants' negligence, and the proximate cause of the injury, as well as the extent of damages, was submitted to the jury. A review of the evidence will disclose that the verdict is not only based on some evidence which would be sufficient here, but that the evidence is so clear, convincing and conclusive that a fair-minded jury could not have found otherwise.

Point II.

One who maintains an obstruction over a natural water course is required to use reasonable care to the end that it does not damage those who may lawfully be found in the course of any waters that are intentionally or incidentally impounded.

> O. W. R. & N. Co. v. Williams (C.C.A., 9th Cir.) 268 Fed. 56.

Dahlgren v. Chicago M. & St. P. Ry. Co., 85 Wash. 395; 148 Pac. 567.
Ryland v. Fletcher (1868) L. R. 3, H. L. 330.
Crawford v. Cobbs & Mitchell Co., 121 Or. 628; 257 Pac. 16.
Allen v. K. P. Timber Co. (Dec., 1935) Or. Advance Sheets, Vol. 22, p. 653.

ARGUMENT

All the law which forms the basis of appellee's cause of action may fairly be said to be included in the statement of this point.

At common law the rule was much more stringent and many early common law cases followed the English case of Rylands v. Fletcher (1868) L. R. 3, H. L. 330, in holding that one who for his own convenience so dealt with the normal flow of the waters of a stream so as to cause them to be impounded and then discharged in a dangerous accumulation was liable PER SE, regardless of negligence, for the resultant damage. A careful examination of the reasoning supporting the English opinion and a tracing of the rules of the common law result in the conclusion that the doctrine is still the law. It is well founded in reason and in justice. It is based upon the theory that whoever interferes with the flow of a stream ought to insure those who may lawfully be in the path of the stream against damage from the interference.

We do not, however, desire to develop the logic or historical foundation of this rule, inasmuch as we

did not rely upon it, but permitted appellant to try the case upon its own theory of the law. We do not need the full force of this rule inasmuch as the evidence of negligence was clear and convincing. The most that can be claimed in appellant's behalf, the most that was claimed at the trial, or is claimed here is in this point of law, as set out above. It answers all of the major part of appellant's brief.

The statement of facts in this brief has been made rather long, because we believe that the very statement of the testimony itself is sufficient argument upon the facts of the case.

The history of the Lewis River is a turbulent one. The streams in that vicinity had been raging for several days before the final catastrophe. For many days the power company had impounded flood waters, stored it up to a great and unusual elevation. As the heavy rains and the warm weather of December, 1933, brought down great volumes of water, the defendant company simply ignored what would have served as a warning to any sensible person, or even slightly careful person, that there was impending disaster ahead unless the flood waters were permitted to escape. Their negligence in storing such large amount of flood waters is overshadowed by their grossly negligent act in suddenly releasing the storage waters, opening everything wide open and abandoning the plant, leaving the lower riparian owners at the mercy of a disastrous flood, in the middle of the night and without any warning.

At the trial, defendants made no effort whatsoever to excuse their conduct in releasing the stored-up waters. They did not call a single witness.

Point III.

The question whether the flood conditions complained of were an Act of God was one for the jury. Under the law even if the flood conditions of the river were of such major proportions as to constitute an Act of God, if negligence of appellant concurred with the unusual flood conditions to produce the injury to plaintiff's property, appellant is yet liable.

Eikland v. Casey, 290 F. 880.
Crawford v. Cobbs & Mitchell Co., 121 Or. 628, 253 Pac. 16.
Kuhins v. Lewis River Boom & Logging Co., 51 Wash. 196; 98 Pac. 655.
Williams v. Columbus Pro. Co., W. Va. 683; 93 S.E. 809; L.R.A. 1918 B 179.
Lyons v. Chi. M. & St. P. Ry. Co., 45 Mont. 33; 121 Pac. 886.

ARGUMENT

We have pointed out, that the evidence showed unusual rainfall and flood conditions in the Lewis River basin during the month of December, 1933. Notwithstanding the unusual heavy rainfall, no injury occurred to plaintiffs' land and the river did not reach a danger point at any time until the impounded waters of Lake Merwin were abruptly re-

leased. Unquestionably a large portion of the flood waters which raged over plaintiffs' property during the early hours of December 22, 1933, was storage water which had been impounded by the appellant's dam.

The whole doctrine of immunity from the results of Acts of God is predicated upon the proposition that they are so sudden that man cannot foresee them or guard against their consequences. There is no authority nor any case in the books which excuses the wrongdoer from the results of his negligence upon the ground that an Act of God concurred with his negligence to cause the damage.

In the case of Eikland v. Casey, 290 F. 880, this Court said:

> "Evidence which does not prove that flooding of plaintiffs' land was so far due to natural causes directly and exclusively without human intervention, that it could not have been prevented by any amount of foresight and care reasonably to have been expected of the defendants, is insufficient, as a matter of law, to show that the flooding was due to the Act of God."

We do not concede that any Act of God, as legally defined, was present in the situation which resulted in this disaster, but even if an Act of God were shown, there certainly was an abundance of evidence that it was not the proximate cause of the injury complained of, but that the proximate cause of the injury was the impounding and abrupt release of flood waters.

In the case at bar, the matter was submitted to the jury. We confidently submit that not only was it a proper question for the jury, but no fair triers of fact could have reached a different conclusion than the jury did.

The uncontradicted evidence shows that the cutting away of plaintiffs' land did not occur until after midnight of December 22, and that the destruction of plaintiffs' property was concurrent in time with the release of the impounded waters of Lake Merwin.

This case differs from some of the cases cited by the authorities in these important particulars:

In the case at bar, the flood followed the deliberate opening of the gates. The negligence of the appellant arises from its deliberate act and its abandonment of the dam property, with the resultant lowering of the lake and the discharge of this tremendous volume of water with the channel of the stream to the damage of the plaintiff. There was no question as to whether or not the consequences could have been foreseen. The consequences were apparent. The volume of excess water loosed by the defendants in opening their flood gates and keeping them open was the proximate cause of the damage complained of.

Point IV.

None of the appellant's assignments of error are well taken.

Arkansas Power & Light Co. v. Beauchamp et al., 43 S.W. (2d) 234.

ARGUMENT

Appellant's assignments of error so far overlap each other as to make it impractical to discuss each as a separate legal proposition. Once the facts of this case and the law as declared by prior decisions of this Court are understood, the assignments are entirely disposed of. The evidence is clear, convincing and conclusive that shortly after midnight, on December 22nd, 1933, the Defendant Company opened their flood gates, wide open, and abandoned their plant. It clearly appears that the power house flood gates and spillways are so constructed that if the gates are all opened when the elevation of the lake is at a high stage, the power house will be swamped with water and put out of commission.

This apparently would be true, regardless of the volume of flow in the stream. By virtue of the fact that the Defendant Company failed to close their gates and arrest the rapid discharge of storage waters, until such time as they were able to obtain outside source of power to operate the flood gates, clearly gives rise to an inference that they were unable to close their gates manually. No other explanation has been made or offered, as to why the Power Company did not attempt to check the tremendous discharge of water and the resultant damage to the plaintiffs.

Exhibit No. A-2 is offered by the appellants in an attempt to show the operation of the gates. It is a company log made by and kept in the company's control at all times and is not submitted to the United States Geological Survey, nor is it a record required under the rules of the Federal Power Commission. In this respect it differs from Exhibits Nos. 10 and 13. We are mindful of the fact that Exhibit A-2 was a bit of evidence which the jury could weigh and attribute whatever significance and credence to, as in their judgment it was worth.

Appellant contends 1st—that there is no evidence to support the verdict. In reply to this contention we point first to Exhibit No. 13. This is a chart made by an automatic stage recorder, which was located in the fore-bay immediately behind the dam structure on the upstream side, and provides continuous history of the rise and fall in the elevation of Lake Merwin at the time this controversy arose.

The vertical lines are so spaced that the space between one line and the next represent a period of two hours. The horizontal lines are so spaced that the space between one to the next represent a difference of six inches in the elevation of the surface of the lake. The exhibit shows that prior to the gigantic release of flood waters, the waters were stored up to an elevation of upward of 237.6 feet.

It is admitted that all of the gates were in a wide open position shortly after midnight December 22nd. Viewing the exhibit it is clearly evident that during

the first 30 minutes after the release, the elevation of the lake dropped six inches. Following the graphic line, it appears that at 10:00 A.M. the elevation of the lake had dropped 2.1 feet and still continuing to drop until in the space of 24 hours the lake was lowered approximately four feet. It is admitted that the lake covers an area of 4,000 acres. Therefore, the volume of water discharged in excess of the natural flow of the stream is not a matter of guesswork or speculation. It is a matter of simple arithmetic, and is clear and convincing.

That the discharge of waters reach a peak of 129,000 cubic feet per second, shortly after midnight is evidenced by Exhibit No. 10 and is not disputed. Again it becomes a matter of simple arithmetic. The amount of acceleration is readily computed and understood by any reasonably intelligent juror.

Mr. Insull, Mr. Miles and other witnesses testified to the visitation of heavy rains and warm weather, in the Lewis River basin in the month of December, 1933, to the storage of flood waters and to the fact that in spite of heavy rains, the river was at low stage for several days prior to the release of the impounded waters. There was conflicting evidence with regard to the position of the gates. Mr. Miles testified (Tr. 115-116), that he was up at the dam and observed the position of the gates on the 20th and 21st of December; that on December 20th, gate No. 1 was up about 10 feet, and No. 2 was out

6 or 8 feet, but the others were tight. On December 21st the gates were about the same as the day before.

This evidence is in direct conflict with Exhibit A-2 offered by appellant. This matter resolved itself into a question of fact for the jury to determine.

Mr. Insull testified, and his testimony is not disputed, that the gigantic flood stage occurred shortly after midnight on the morning of December 22nd.

In view of the tremendous on-rush of water occurring shortly after midnight begining December 22nd, when the power plant was abandoned by the crew, and in view of the abrupt drop in the lake elevation, the jury may have given but little credence to Exhibit A-2 which was offered by the defendant company. In any event the fact that no effort was made to check the discharge of storage waters stands as mute evidence of appellant's negligence, if not of culpable disregard of down-river residents.

Appellant contends that any verdict rendered on the evidence would be purely speculative. Referring to the record and particularly to the testimony of Mr. Phillips and Mr. Grieger with regard to the effect of the rush of water. Mr. Phillips testified (Tr., 70):

> "The river was the same after the 20th—the 21st. I did not notice any noticeable change until the morning of the 22nd, was the first change that I noticed. It raised all right on the 21st,

on the morning of the 22nd it was more like an ocean than a river, then.

"The morning of the 22nd, I would say, was the first I noticed the river begin to cut. It just simply cut everything—cut the whole place and washed away down—it looked to be down about 8 or 10 or 12 feet. It washed down to gravel or bedrock."

Mr. Grieger testified (Tr., 158):

"I did not at any time observe the current cutting away any of my land up to the 21st; I noticed it on the 22nd. We stood on the hill above the water, and we could see it taking the trees which was down on the northeast corner. I saw it wash out practically two channels through the land at the time." (Tr., 160).

"Approximately around 45 acres of my land was washed away, and I should judge in the neighborhood of 30 or 35 acres of it was covered with sand."

The evidence shows conclusively that the destruction wrought was concurrent in time with the release of storage water. Hence, the only reasonable inference which could be drawn from such a set of facts is that the sharp release of storage waters so accelerated the flow of the stream that it simply swamped everything in its wake. Quoting from appellant's brief (page 64):

> "The real issue, as shown by authorities in this brief, is whether appellees' damage was caused wholly by the natural flood flow of the stream, or partly by such natural flow and partly by acts or defaults of appellant, within the allegations and proofs, and if the latter be established, then whether such acts or defaults constituting negligence, having in mind further, what a reasonably prudent man, informed as to the habits of the stream and taking all factors into consideration would have done under like circumstances."

We have no quarrel with that statement of the issue. In fact, that issue was submitted to the jury and thereupon the jury found for appellees (plaintiffs). (See instructions.)

The case of Arkansas Power and Light Company vs. Beauchamp et al., 43 S.W. (2d) 234 (1931), is a case which arose out of a situation substantially the same as the case at bar.

The Arkansas Power and Light Company built a power dam called the Remmel Dam across the Ouachita River, by which a reservoir known as the Lake Catherine was created covering an area of approximately 3,000 acres. The plaintiffs in that case owned and operated some small farms lying adjacent to the Ouachita River about 10 to 14 miles below the Remmel Dam. A few days prior to October 7, 1930, heavy rainfall commenced in the watershed of the Ouachita River. On October 7, 1930,

a part of these farms were overflowed, and the crops thereon were destroyed. The plaintiffs brought suit against the company to recover damages for the destruction of the crops on the ground that the same was occasioned by the negligent operation of the flood gates of the Remmel Dam by which a volume of water was suddenly released from the reservoir above into the stream below in such quantities as to cause the overflow and damage. At the trial of the issue a verdict was rendered for the plaintiffs.

The principal question raised and argued upon appeal was the sufficiency of the evidence; the contention being that there was no competent evidence of a substantial nature to support the verdict.

The Remmel Dam was so constructed as to impound the waters of the Ouachita River and raise them to a certain height and then permit the ordinary flow of the river to pass over the dam to the river below. The dam was constructed with 12 openings each 27½ feet wide and 18 feet deep called flood gates. These gates were for the purpose of letting the excess waters through in times of flood. The gates were so arranged that they might be raised any desired height at the will of the person in charge of the dam. The testimony of the witnesses for the company tended to prove that the flood gates were properly operated. Indeed, there was evidence sufficient to have warranted a verdict for the company IF it had been accepted by the

jury. In that case the Court said:

> "Since this testimony was not accepted by the jury, it becomes important to review the circumstances as appears in the evidence tending to contradict that testimony and to refute the contention made by appellant."

The circumstances which the testimony tended to establish were as follows: On the vicinity of the Remmel Dam there had been a severe drought prior to October 5th and the river was extremely low. Then a heavy rain began falling on the afternoon of October 5th and continuing until October 7th. At this time the waters began to pile up and the flood gates of Remmel Dam were begun to be opened, raising the water in the river and flooding the lands below. The water which came down then was clear as spring water. In commenting upon the evidence the court said:

> "It is common knowledge that water in a lake becomes clear. These circumstances warranted the inference that the water came from Lake Catherine and that the flood gates had been opened negligently, and the jury were justified in the conclusion that the appellant then opened the flood gates more than was necessary and to such an extent that the flood resulted."

> "It is elementary law that any fact at issue may be proven by circumstantial evidence."

It is a matter of common knowledge, that a large volume of water suddenly released becomes a competent agent of destruction. A jury does not need the aid of an expert to understand this. In the case at bar, the evidence of tremendous acceleration is clear, and gives rise to the strongest inference, particularly when it is proved that the destruction was concurrent in time with the release of storage waters.

The evidence shows the channel of the Lewis River was sufficient to carry the natural flow of the stream at all times, without causing any damage to plaintiffs' property. On the 21st day of December the record shows an average flow of more than 84,000 cubic feet per second, which would of course indicate that the maximum flow for that day would be something more than that figure. Mr. Phillips and Mr. Grieger both testified that appellees' (plaintiffs') property was not damaged until December 22nd when the lake level was lowered by releasing storage waters which greatly accelerated volume and velocity of the flow. The record bears ample evidence to show that at a time when the river was at a flood stage such as to endanger the lower riparian owners, the appellant (defendant) loosed a tremendous force and abandoned its plant, leaving plaintiffs helpless in the wake of destructive forces.

On page 51 of appellant's brief, we find the following language:

> "It would be inferred from examination of Exhibit No. 13 that upon completing the opening of No. 5 gate, the lake level dropped a half foot in 16 minutes, implying a discharge of 2,000 acre feet during that period."

In so many words appellant admits the rise of inferential evidence, and attempts to supply "evidence" to the effect that the opening of gate No. 5 had some disturbing effect upon the mechanism of the recording gauge.

No such explanation, however, was offered to the jury, nor does appellant attempt to show that if the opening of gate No. 5 affects the gauging mechanism, why the closing of the same should not have -a -corresponding effect upon the gauging mechanism.

In this connection the testimony of Superintendent Shore is interesting. He testified (Tr., 87):

> "The elevation dropped during the period that the gates were all opened. I don't remember exactly how much until we get this government chart. I would say in the course of it, maybe hours to go a foot, maybe, or two foot, something like that, BUT THOSE CAN ALL BE GOTTEN OFF THESE GOVERNMENT RECORDS. THAT WILL SHOW THE DROP EXACTLY FROM THE TIME IT REACHED THE CREST UNTIL IT WENT DOWN."

In other words, Mr. Shore admits that the Exhi-

bit No. 13 shows exactly what happened to the lake level.

Referring to the appendix of appellant's brief, table No. 1, it appears that they have prepared a record of considerable volume, but have conveniently omitted the record for that period of time over which this controversy arose, namely from 12:16 A.M. to 2:00 P.M. Friday, December 22nd, 1933.

We shall attempt to supply that omission, compiling our data from Exhibit No. 13.

RECORD OF DECEMBER 22ND, 1933—
12:16 A.M. to 2:00 P.M.

Date	Hour	Lake Elevation Exhibit No.	Approximate amount of spill —sec. ft.
Friday,	12:16 A.M.	237.6	129,000
December	12:46 A.M.	237	
22, 1933	2:00 A.M.	236.8	Diminishing
	4:00 A.M.	236.5	spills*
	6:00 A.M.	236.1	
	8:00 A.M.	235.8	
	10:00 A.M.	235.5	
	12:00 Noon	235.2	
	2:00 P.M.	234.9	112,600

*Note: The volume of spill would of course diminish as the elevation of the lake was lowered.

The record is clear on the two major points in this case. The evidence shows that at the time in question, the appellant company released great quantities of storage waters, and concurrent there-

with the property of appellees was damaged by the waters so released. As to the handling of the flood gates and their positions at various times, there is a conflict of evidence between Mr. Miles' testimony and Exhibit A-2 which resolved itself into a question of fact for the determination of the jury.

In any event, the evidence shows that the gates were so handled by appellant that 16,000 acre feet of storage water was dumped upon the lower riparian owners, including appellees, in a short space of time while the natural flow of the stream was at a high stage.

CONCLUSION

A careful perusal of appellant's brief has drawn the undersigned forcibly to the conviction that the appellants base their hope for reversal, not upon any lack of substantial evidence in the record to sustain the jury's verdict, but rather upon THEIR con cept of the weight of the evidence. With commendable zeal for the cause of their client, counsel have hoped that this Court might agree with them in the belief that the jury would better have found for the appellant than for the plaintiff. Unfortunately the jury saw the evidence with an eye uncolored by the partisanship of counsel for the appellant. Whether the jury was unwise or not is for no one to say. We are convinced that this Court has no intention of trying the case over again and handing down a

verdict more in conformity with appellant's belief, than was the jury's verdict below.

Respectfully submitted,

WM. P. LORD,
GROSS & ANDERSON,
Harry L. Gross
Ben Anderson
Attorneys for Appellees.

CHART FOR GURLEY GRAPHIC RECORDER

MADE BY W. & L. E. GURLEY, TROY, N. Y., U. S. A.

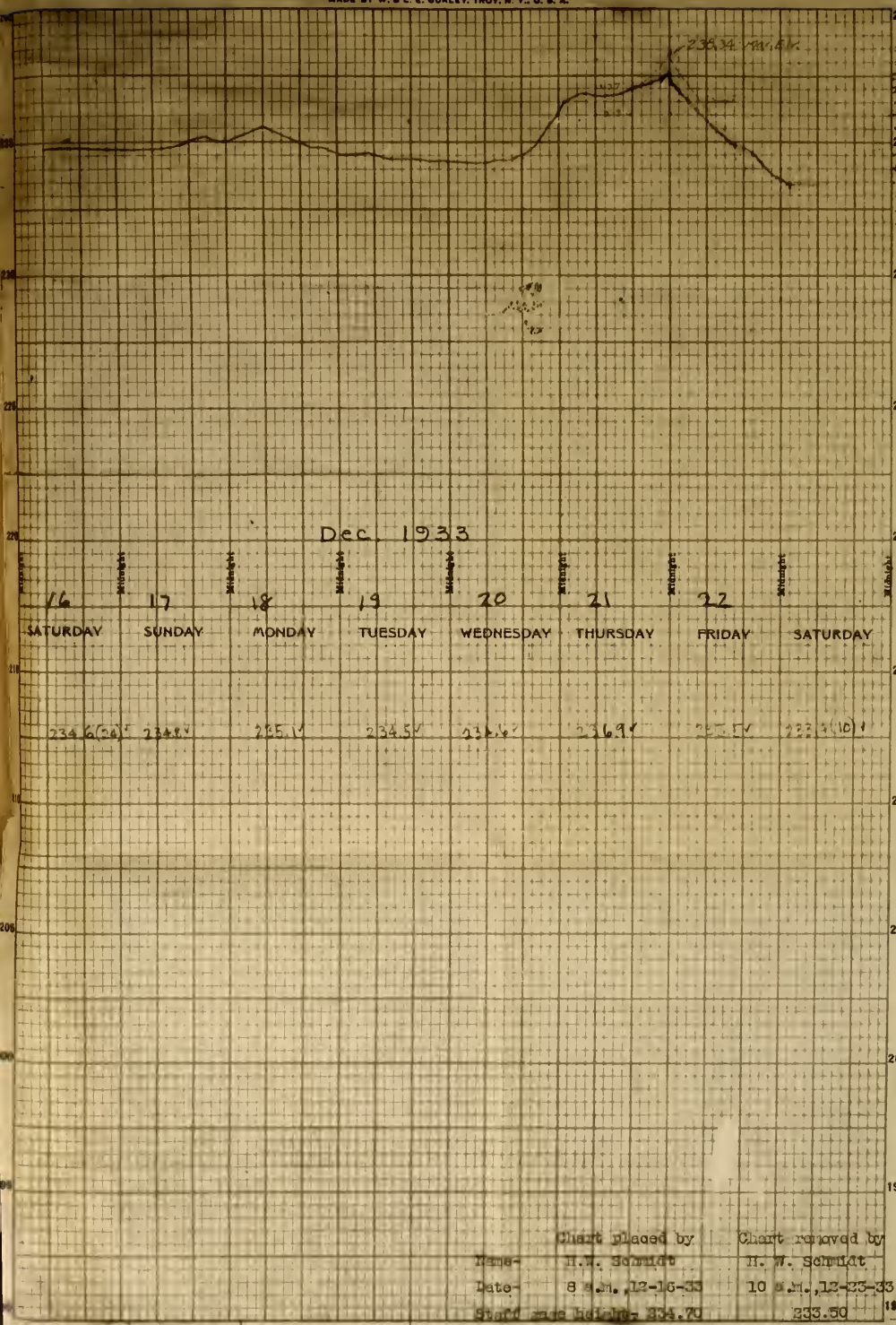

	Chart placed by	Chart removed by
Name-	H.W. Schmidt	H. W. Schmidt
Date-	8 a.m. 12-16-33	10 a.m. 12-23-33
Staff gage height-	234.70	233.50

LOCATION Lake Merwin near Ariel, Wash.
RESERVOIR LEVEL
GAGE

Time: 1 Week
Range: 190 to 240 ft.
Scale: 12" = 50 Ft.

CHART PLACED BY	CHART REMOVED BY
Name H W Schmidt	Name H W Schmidt
8 (hour) 12 (month) 16 (day) 33 (year)	10 (hour) 12 (month) 23 (day) 33 (year)
Staff gage height 234.70	Staff gage height 233.50